IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1903.

No. 118

C. W. CORNELL and F. B. CORNELL, copartners doing business under the name and style of Cornell Brothers,

Plaintiffs in Error,

vs.

F. E. COYNE, late United States Collector of Internal Revenue, First District of Illinois,

Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

STATEMENT.

This is a suit brought by the plaintiffs in error, who are co-partners doing business as Cornell Brothers, in the Circuit Court of the United States for the Northern District of Illinois, against F. E. Coyne as late United States Collector of Internal Revenue, First District of Illinois, defendant in error, to recover various sums of money exacted

by him as collector at various times during his term of office, and as an internal revenue tax upon various quantities of filled cheese manufactured and exported by them, all of which sums were paid by the plaintiffs in error under protest.

It was claimed by the plaintiffs in error at and prior to the various times when said taxes were paid, that the levy and collection of such taxes were a violation of Section 9, Article 1, of the Constitution of the United States, which provides that no tax or duty shall be laid on articles exported from any state.

For a number of years Cornell Brothers have been engaged in the manufacture of filled cheese in the town of Huntley, McHenry county, Illinois, and at various times subsequent to the first day of August, 1897, they entered into various contracts in London and Liverpool, England, by the terms of which they agreed to manufacture large quantities of filled cheese in their factories in McHenry county, and to export and deliver the same in Liverpool and London in certain fixed quantities and at various intervals specified, and after said 1st day of August, and prior to the 1st day of April, 1901, they manufactured and exported and delivered in London and Liverpool, under such contracts, 1,580,479 pounds of filled cheese, manufactured by them during said period. During this entire period they complied with the Internal Revenue Laws of the United States with reference to the payment of an annual manufacturers' tax, as required by Section 3 of the Act of June 6, 1896. (29 Stat., 253.)

Each quantity or installment of filled cheese manufactured under these contracts was forwarded as soon as the same was ready for shipment direct from the factory, and application was made to the Internal Revenue Collector for

the District, for leave to forward the same without purchasing and attaching to the packages the revenue stamps required by the said Act of Congress; but notwithstanding the fact that said filled cheese was manufactured for export, and was about to be delivered for export and shipment to a foreign country, the defendant in error as such collector, refused to permit the shipments to be made until plaintiffs in error should first procure and attach to said packages the stamps required by the said Act of Congress.

Cornell Brothers were compelled to comply with this requirement in order to avoid arrest, and paid the tax specified in the said act as required by the collector, on all of the filled cheese manufactured and exported by them under these contracts. These payments extended over a period beginning September 7th, 1897, and ending March 19th, 1901.

Afterwards, and on the 8th day of May, 1901, plaintiffs in error made an appeal in writing to the Commissioner of Internal Revenue, as required by Section 3226 of the Revised Statutes of the United States, for the purpose of recovering the various sums of money so paid by them, but on the 6th day of January, 1902, the commissioner rendered a decision whereby their claim was rejected.

The action is Assumpsit, and the declaration, after setting up the foregoing facts with reference to the making of the said contracts, the manufacture of the said filled cheese thereunder, and the requirements of said collector for the payment of the said tax before he would permit the said cheese to be shipped under said contracts, contains the following averment:

> "That the plaintiffs objected and protested against the said requirement of said defendant, and contended that under the provisions of the constitution aforesaid plaintiffs were not required to place such revenue

stamps upon the said commodity when manufactured for export and exported and sold in a foreign market; but notwithstanding said protests repeated threats were made by the defendant to arrest and prosecute the plaintiffs for a supposed violation of said alleged act of Congress last mentioned, unless the plaintiffs would immediately procure and purchase revenue stamps as required by said act and attach the same to said packages before delivering the same to be forwarded in the manner aforesaid; and governed wholly by said threats of arrest and prosecution, and not otherwise, said plaintiffs did make a written requisition upon the defendant as said Internal Revenue Collector, for internal revenue stamps to be attached by them to the packages of filled cheese included in each of the said shipments, which said revenue stamps amounted in the aggregate to a large sum of money, to-wit: the sum of $20,000, which said requisitions, and each of them stated upon the face thereof in writing, that the same was made by plaintiffs under protest; and plaintiffs aver that revenue stamps were furnished to the plaintiffs by the said defendant as such collector under such requisitions, amounting to the sum aforesaid, which were paid by the plaintiffs to said defendant upon delivery. That the said requisitions, and each of them, were made by the plaintiffs wholly by reason of the demands of the defendant, and by reason of the threats aforesaid, and not otherwise.

"Plaintiffs aver that the requirements of the said defendant whereby the plaintiffs were compelled in the manner aforesaid to purchase and use the said revenue stamps, were wholly unauthorized and unwarranted by law; and that Section 9 of the Act of Congress aforesaid, and said act itself in that the same failed to contain provisions whereby filled cheese manufactured for export trade and exported and sold in foreign markets wholly without the United States, might be exported and sold free from the levy of any duty or tax thereon; or provision whereby the same might be freed from

the force and effect of said act, are repugnant to said Section 9, Article 1, of the Constitution of the United States, and that this suit, therefore, involves the construction or application of the Constitution of the United States." (5, 6.)

To the declaration is attached a bill of particulars giving the date of each shipment under said contracts, the number of packages and the number of pounds contained in each shipment, and the name of the place and the person or persons to whom each of said shipments was consigned; also the dates for the requisitions for stamps to attach to such shipments, and the amounts paid therefor, from which it appears that in each instance, or practically so, the requisition was made and the stamps procured for each shipment on the very day that the shipment was forwarded. (9-12.)

A general demurrer (13) was interposed to this declaration, which, upon the hearing, was sustained by the court and the plaintiffs, electing to stand by their pleadings, judgment was entered in favor of the defendant and against the plaintiffs. (14.) Exceptions were duly preserved to the rulings of the court, and the record is brought to this court upon a writ of error to review such rulings.

The act of June 6th, 1896, already referred to, is entitled "An Act defining cheese, also imposing a tax upon and regulating the manufacture, sale, importation and *exportation* of 'filled cheese.'" By the terms of the act special taxes are imposed upon manufacturers of filled cheese, and upon wholesale and retail dealers, and provisions are made for the payment of an annual tax by each.

Sections 9, 10, 16 and 18 are as follows:

"Sec. 9. That upon all filled cheese which shall be manufactured there shall be assessed and collected a tax of one cent per pound, to be paid by the manu-

facturer thereof; and any fractional part of a pound in a package shall be taxed as a pound. The tax levied by this section shall be represented by coupon stamps; and the provisions of existing laws governing the engraving, issue, sale, accountability, effacement and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section."

"Sec. 10. That whenever any manufacturer of filled cheese sells or removes for sale or consumption any filled cheese *upon which the tax is required to be paid by stamps,* without paying such tax, it shall be the duty of the Commissioner of Internal Revenue, within a period of not more than two years after such sale or removal, upon satisfactory proof, to estimate the amount of tax which has been omitted to be paid, and to make an assessment therefor and certify the same to the collector. The tax so assessed shall be in addition to the penalties imposed by law for such sale or removal."

"Sec. 16. That all packages of filled cheese *subject to tax under this act,* that shall be found without stamps or marks, as herein provided, and all filled cheese intended for human consumption which contains ingredients adjudged as hereinbefore provided, to be deleterious to the public health, shall be forfeited to the United States."

"Sec. 18. That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make all needful regulations for the carrying into effect the provisions of this act." (29 Stat., 253; vol. 2, U. S. Compiled Statutes, 2236.)

Unlike all other internal revenue acts passed by Congress either prior or subsequent, the act contains no provision for the exportation of filled cheese without the payment of the tax; and the regulations promulgated by the department concerning filled cheese, make no reference to the exportation

of the same, but such regulations for the enforcement of Sec. 9 contain the following:

"On the withdrawal of a package the proper tax-paid stamp must be affixed thereto by the manufacturer in the same manner as the label."

Neither the act nor the regulations, however, provide specifically when and where the label shall be affixed.

We will endeavor to cover the various assignments of error by a discussion of the following propositions, viz.:

I. The levy and collection of the tax was unwarranted by law for the following reasons:

(1) It was forbidden by the constitution, which provides that no tax or duty shall be laid on articles exported from any state.

(2) This provision of the constitution is self executing.

(3) This provision of the constitution and the act of June 6th, 1896, like statutes *in pari materia*, must be construed together, and taken together they constitute the law governing the powers and duties of the internal revenue officers of the government.

(4) The court, in construing a doubtful statute will consider:

(a) The title of the act.

(b) The act as a whole, including all its provisions.

(5) It was the duty of the Commissioner of Internal Revenue to make regulations whereby filled cheese could be exported without payment of the tax.

II. If the collector, under the strict letter of the act of June 6th, 1896, was required to levy and collect the tax in question, then said act is unconstitutional.

BRIEF.

I.

THE LEVY AND COLLECTION OF THE TAX WAS UNWARRANTED BY LAW FOR THE FOLLOWING REASONS:

(1) *It was forbidden by the constitution, which provides that no tax or duty shall be laid on articles exported from any state.*

Article I of the Constitution of the United States is devoted to the legislative branch of the government; Section 8 enumerates the powers of Congress; and Section 9 enumerates the limitations and restrictions on the powers of Congress. The fifth paragraph of Section 9 is:

> "No tax or duty shall be laid on articles exported from any state."

"Exported" is a perfect participle, and this clause should be construed to mean that no tax or duty shall be laid on any articles *which are exported from any state.*

> Century Dictionary, verb "export" and word "participle."

Provisions of the Constitution must receive a reasonable interpretation.

> Story on the Constitution, Sec. 419.

And such reasonable interpretation should be given as well to limitations upon the power of Congress as to grants of power.

> *Fairbanks* v. *U. S.*, 181 U. S., 283; 21 Sup. Ct. Rep., 648, 650.

The same word should not necessarily be construed in the same sense wherever it occurs in the same instrument.

Story on the Constitution, Sec. 454.

This provision was to prevent discrimination by Congress between the states, and prohibits any taxation by Congress upon articles which are "exported."

Pace v. *Burgess*, 92 U. S., 372; 23 L. ed., 657, 659.

Fairbanks v. *U. S.*, 181 U. S., 283; 21 Sup. Ct. Rep., 648, 651, 652, 653.

Story on the Constitution, Sec. 1014.

Cases involving the question of interstate commerce such as *Coe* v. *Errol*, 116 U. S., 517; 6 Sup. Ct. Rep., 475, and kindred cases, have no application.

There is a distinction between the terms "tax" and "duty" as used in this clause of the Constitution. The latter is a charge fixed by reason of exportation or importation, while the former applies to any charge which may be laid upon persons or property for the support of the government.

Story on Constitution, Sec. 952.

Pacific Ins. Co. v. *Soule*, 7 Wall., 433; 19 L. ed., 95 to 99.

Hylton v. *U. S.*, 3 Dall., 171.

Savings & Loan Assn. v. *Topeka*, 21 Wall., 655; 22 L. ed., 455, 461.

Dooley v. *U. S.*, 183 U. S., 151; 22 Sup. Ct. Rep., 63.

It is a fair conclusion from the facts set up in the declaration that the intended export of the filled cheese therein mentioned was the immediate cause of the levy and collection of the tax involved in this case.

(2) *This provision of the Constitution is self executing.*

Groves v. *Slaughter*, 15 Pet., 449; 10 L. ed. 801, 819.

Davis v. *Burke*, 179 U. S., 399; 21 Sup. Ct. Rep., 210.

Dill v. *Ellicott*, 7 Fed. Cas., 691.

Ill. Cent. Ry. Co. v. *Ihlenberg*, 75 Fed. Rep., 873.

Law v. *People*, 87 Ill., 385, 392.

Wash. Home v. *City*, 157 Ill., 414, 426.

Fuller v. *Chicago*, 89 Ill., 282.

Approved by the Supreme Court of the United States.

Buchanan v. *Litchfield*, 102 U. S., 278; 26 L. ed., 138.

Same principle upheld in—

Board of Lake Co. Comrs. v. *Rollins*, 103 U. S., 662; 32 L. ed., 1060.

Dixon County v. *Field*, 111 U. S., 83; 28 L. ed., 360.

Doon Township v. *Cummins*, 142 U. S., 370; 12 Sup. Ct. Rep., 220.

(3) *This provision of the Constitution and the act of June 6th, 1896, like statutes* IN PARI MATERIA *must be construed together, and taken together they constitute the law governing the powers and duties of the revenue officers of the government.*

Cooley on Constitutional Limitations, p. 3.

Story on the Constitution, Sec. 374.

Cooper Mfg. Co. v. *Ferguson*, 113 U. S., 727; 28 L. ed., 1137.

Billingsley v. *State*, 14 Md., 369, 376.

Statutes *in pari materia* are construed together.

U. S. v. *Freeman*, 3 How., 556, 564; 11 L. ed., 724.

Doe ex. Dem. Patterson v. *Winn*, 11 Wheat., 380, 386; 6 L. ed., 500.

Atkins v. *Fiber, etc., Co.*, 18 Wall., 301; 21 L. ed., 841, 844.

Ryan v. *Carter*, 93 U. S., 84; 23 L. ed., 807, 809.

The Sloop Elizabeth, 1 Paine C. C. R., 11; 8 Fed. Cas., 468.

Potter's Dwarris on Statutes, p. 189 and note.

Smith's Commentaries, Statutory and Constitutional Construction, p. 751.

Revenue laws are liberally construed.

Cliquot v. *U. S.*, 3 Wall., 114; 18 L. ed., 116, 121.

Smythe v. *Fiske*, 23 Wall., 374; 23 L. ed., 47.

Against as well as in favor of the government.

U. S. v. *Stowell*, 133 U. S., 1; 10 Sup. Ct. Rep., 244.

Courts, in construing a statute, will restrain its operation within narrower limits than its words import if satisfied that the liberal meaning of its language would extend to cases which a legislature never designed to include in it.

Lessee of Brewer v. *Blougher*, 14 Pet., 178, 198; 10 L. ed., 408, 418.

Oates v. *National Bank*, 100 U. S., 239, 244; 25 L. ed., 581.

U. S. v. *Am. Bell Tel. Co.*, 159 U. S., 548; 16 Sup. Ct. Rep., 70.

McKee v. *U. S.*, 164 U. S., 287; 17 Sup. Ct. Rep., 93, 95.

Woolridge v. *McKenny*, 8 Fed. Rep., 650, 659.

Where there are two acts or provisions, one special and particular, the other general, if the general standing alone would include the same matter and thus conflict with the special, the special provision must be taken as an exception.

Rodgers v. *U. S.*, 185 U. S., 83; 22 Sup. Ct. Rep., 582, 583.

Crane v. *Reeder*, 22 Mich., 322, 334.

Ex parte Crow Dog, 109 U. S., 556, 570.

Black on Interpretation of Laws, 116.

Sedgwick on the Construction of Statutory and Constitutional Law, 98.

A law requiring two repugnant and incompatible things is incapable of receiving a literal construction, and must sustain some change of language to be rendered intelligible in order to arrive at the intention of the legislature.

Huidekoper's Lessee v. *Douglass*, 3 Cranch., 1, 66; L. ed., 347, 368.

Additional words of qualification may be added to a general provision.

Rodgers v. *U. S.*, 185 U. S., 83; 82 Sup. Ct. Rep., 582, 584.

Courts avoid constructions which make a law unconstitutional.

U. S. v. *Coombs*, 12 Pet., 72; 9 L. ed., 1004, 1006.

U. S. v. *Cent. Pac. Ry. Co.*, 118 U. S., 241; 30 L. ed., 175.

Hooper v. *People*, 155 U. S., 657; 15 Sup. Ct. Rep., 211.

Grenada Co. v. *Brown*, 112 U. S., 261; 28 L. ed., 704.

Parsons v. *Bedford*, 3 Pet., 433, 449; 7 L. ed., 737.

Courts also avoid a construction which makes a law ridiculous or absurd.

Holy Trinity Church, etc., v. *U. S.*, 143 U. S., 457; 12 Sup. Ct. Rep., 511, 513.

U. S. v. *Hogg*, 112 Fed. Rep., 909; 50 C. C. A., 608.

(4) *The court, in construing a doubtful statute, will consider—*

(a) *The title of the act.*

U. S. v. *Fisher*, 2 Cranch., 358, 387; 2 L. ed., 304, 313.

U. S. v. *Palmer*, 3 Wheat., 610, 631.

Smythe v. *Fiske*, 23 Wall., 374; 23 L. ed., 47.

Holy Trinity Church v. *U. S.*, 143 U. S., 457; 12 Sup. Ct. Rep., 511, 513.

Hadden v. *the Collector*, 5 Wall., 107; 18 L. ed., 518.

U. S. v. *Trans. Mo., etc., Assn.*, 166 U. S., 290; 17 Sup. Ct. Rep., 540, 553.

Price v. *Forest*, 173 U. S., 410; 19 Sup. Ct. Rep., 434, 440.

Coosaw Mining Co., v. *State of South Carolina*, 144 U. S., 550; 12 Sup. Ct. Rep., 659.

(b) *The act as a whole, including all its provisions.*

U. S. v. *Fisher*, 2 Cranch., 358, 386; 2 L. ed., 304, 313.

U. S. v. *Stowell*, 133 U. S., 1; 10 Sup. Ct. Rep., 244.

(5) *It was the duty of the Commissioner of Internal Revenue to make regulations whereby filled cheese could be exported without payment of the tax.*

Sec. 18 of the Act of June 6th, 1896, provides that the Commissioner of Internal Revenue, with the approval of

the Secretary of the Treasury, shall make all needful regulations for the carrying into effect the provisions of the said act.

29 Statutes, 253; Vol. 2, U. S. Compiled Stat., 2236.

The regulation of the commissioner requiring a manufacturer to affix the proper tax-paid stamp on the withdrawal of a package was unauthorized. The commissioner or Secretary of the Treasury can not make regulations which will defeat the law.

Campbell v. *U. S.*, 107 U. S., 410; 27 L. ed., 593.

U. S. v. 100 *Barrels of Whiskey*, 95 U. S., 571; 24 L. ed., 491.

Morrill v. *Jones*, 106 U. S., 467; 27 L. ed., 268.

II.

If the collector, under the strict letter of the Act of June 6th, 1896, was required to levy and collect the tax in question, then said act is unconstitutional.

Pace v. *Burgess*, 92 U. S., 372; 23 L. ed., 657, 659.

Fairbanks v. *U. S.*, 181 U. S., 283; 21 Sup. Ct. Rep., 648, 651, 652, 653.

Dooley v. *U. S.*, 183 U. S., 151; 22 Sup. Ct. Rep., 63.

Marbury v. *Madeson*, 1 Cranch., 178; 2 L. ed., 74.

The construction placed by Congress upon this clause of the Constitution, by inserting in all prior and subsequent internal revenue acts a provision for exportation without payment of the tax, should have great weight in determining the constitutionality of the act.

Stuart v. *Laird*, 1 Cranch., 299; 2 L. ed., 115.

Burlow-Giles Lith. Co. v. *Sarony,* 111 U. S., 53; 28 L. ed., 249; 4 Sup. Ct. Rep., 279.

The Laura, 114 U. S., 411; 29 L. ed., 147; 5 Sup. Ct. Rep., 881.

U. S. v. *Filbrick,* 120 U. S., 52, 59; 30 L. ed., 559, 561; 7 Sup. Ct. Rep., 415.

U. S. v. *Hill,* 120 U. S., 169, 182; 30 L. ed., 627, 632; 7 Sup. Ct. Rep., 510.

Robertson v. *Downing,* 127 U. S., 607 to 613; 32 L. ed., 269, 271; 8 Sup. Ct. Rep., 1328.

Schell v. *Fauche,* 138 U. S., 562, 572; 34 L. ed., 1040, 1043; 11 Sup. Ct. Rep., 376, 380.

ARGUMENT.

I.

THE LEVY AND COLLECTION OF THE TAX WAS UNWARRANTED BY LAW.

(1) *It was forbidden by the Constitution, which provides that no tax or duty shall be laid on articles exported from any state.*

Article 1 of the Constitution of the United States is devoted to the legislative branch of the government; Section 8 enumerates the powers of Congress; and Section 9 enumerates the limitations or restrictions on the powers of Congress. The fifth paragraph of Section 9 is as follows:

> "No tax or duty shall be laid on articles exported from any state."

Perhaps the first question which naturally arises in a consideration of this branch of the case, is:

Does this provision in the Constitution apply to this case as made out by the declaration, and are the goods exported, as set forth in the declaration, "articles exported" within the meaning of that term as employed in this provision of the Constitution?

The language is that no tax shall be laid on "articles exported." The word "exported" is undoubtedly a participle derived from the transitive verb "export," and is used in this connection as an adjective, or as what is known as a participial adjective, limiting or defining the term articles.

The Century Dictionary gives the following definition of the transitive verb "export":

> "To send to a distant point, as commodities; send for sale or exchange to other countries or places,"

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and Webster gives to the same word the following definition:

> "To carry from a state or country, as wares in commerce; to send out, as valuable commodities, to other nations or communities; as to *export* grain, cotton and the like."

The Century Dictionary defines the word "participle" as "a verbal adjective that participates or shares in the con-"struction of the verb to which it belongs, and so has in a "certain manner and degree a place in the verbal system; "and should have the value of the adjective as part of "speech, but so regularly made from a verb and associated "with it in meaning and construction as to seem to belong "to the verb. Thus 'giving him a book' like 'I give him a "book'; 'the book given him' or 'lent him' or 'handed him'; "and so on."

It would seem, therefore, that the words "articles exported," as used in this clause of the Constitution, are equivalent to the phrase or expression "articles which are exported," and, therefore, the full meaning of the provision would seem to be that no tax or duty shall be laid on any *articles which are exported from any state.*

"Export" is defined in the Century Dictionary as "that "which is exported; a commodity carried from one place "or country to another for sale"; and in Webster's International Dictionary as "that which is exported; a commod-"ity conveyed from one country or state to another in the "way of traffic."

These definitions are in harmony with the decisions of this court, except that in the cases of *Brown* v. *Houston,* 114 U. S., 622; 29 L. ed., 257; *Woodruff* v. *Purham,* 8 Wall., 123; 19 L. ed., 382; and *Dooley* v. *U. S.,* 183 U. S., 151; 22 Sup. Ct. Rep., 62, 66, it was held that the words "exports" and "imports," as used in the Constitution, particu-

larly in Sec. 10, Art. I, relate only to exports to and imports from foreign countries.

While, according to these definitions, "export" is in a sense synonymous with "articles exported," the connections in which they are used in the Constitution would seem to indicate that the framers of that instrument did not intend to use these words or expressions interchangeably. In paragraph 5, Section 9, the language used is as above stated "no tax or duty shall be laid on articles exported from any state"; but in paragraph 2, Section 10, of the same article, the language used is: "No state shall, without the consent of Congress, lay any imposts or duties on imports or exports." It is a matter of history that in the first draft of the Constitution the latter provision stood "no state, without the consent of Congress, shall lay imposts or duties on imports," the word "exports" not being included. But the provision was subsequently amended by adding "or exports."

Journal of Constitutional Convention, 227, 303.

The term here employed is so intimately connected with the word "imports" that the word "exports" was very naturally adopted as conveying the corresponding idea of articles sent out to and sold in foreign countries.

It does not follow that the words "articles exported" are used in the provision restricting the powers of Congress in precisely the same sense that the word "exports" is used in the provision restricting the powers of the state. In Story on the Constitution, Sec. 454, in discussing rules of interpretation, the author says:

> "And this leads us to remark in the next place that it is by no means a correct rule of interpretation to construe the same word in the same sense wherever it occurs in the same instrument. It does not follow, either logically or grammatically, that because a word

is found in one connection in the Constitution with a definite sense, therefore, the same sense is to be adopted in every other connection in which it occurs. This would be to suppose that the framers weighed only the force of single words as philologists or critics, and not whole clauses and objects as statesmen and practical reasoners."

The word "export" as used in the tenth section is employed as a restriction applied to the states and not to the general government. The subsequent decisions of this court on questions affecting the powers of any state to regulate and control property within its limits, afford sufficient justification for the argument that a *state* may levy taxes on goods within its borders at any time prior to the time when exportation actually commences, at which time such goods are brought under the immediate control of Congress under the power granted in the Constitution to regulate commerce among the states with foreign nations and Indian tribes, but it does not follow that a collector of internal revenue has power under the Constitution to exact a tax on "articles exported" at any time or under any conditions; and, inasmuch as the words "articles exported" are used in this connection in preference to the term "exports," it would seem that it was clearly intended that no tax should thus be levied or collected upon "articles exported" under any circumstances, either before or after exportation had actually commenced.

It seems, therefore, that the words "articles exported" as used in Section 9 of the Constitution, include any and all products which may at any time be exported, and relate to such products in their general character or condition before as well as after exportation has actually commenced; while the word "exports," as used in Section 10, has a more limited significance, and relates not to the character of such products

generally, but simply has reference to their character as exports, and at the time when and after exportation has actually commenced.

In construing the Constitution courts frequently seek light from the history of the convention which formulated and adopted that instrument, and by referring to these proceedings it appears that this clause, in the precise form in which it was finally adopted, was reported in the first draft of the Constitution. Subsequent attempts were made to amend it, one by inserting after the word "duty" the words "for the purpose of revenue," and the other by inserting at the end the words "unless by consent of two-thirds of the legislature," but neither of these amendments was adopted.

This would seem to indicate that it was the purpose of the convention to prohibit all taxes by the general government of every form upon "articles exported," and that no such tax was to be permitted for any purpose or under any pretext whatever.

Mr. Story, in his work on the Constitution, Sec. 1014, in commenting on this provision, and the other restrictions contained in the same paragraph of the Constitution says:

> "The obvious object of these provisions is to prevent any possibility of applying the power to lay taxes or regulate commerce injuriously to the interests of any one state so as to favor or aid another. If Congress were allowed to lay any duty on exports from any one state it might unreasonably injure, or even destroy the staple productions or common articles of that state. The inequality of such a tax would be extreme. In some of the states the whole of their means result from agricultural exports. In others a great portion is derived from other sources, from external fisheries, from freights, and from the profits of commerce in its largest extent. The burden of such a tax would, of course,

be very unequally distributed. The power is, therefore, wholly taxen away to intermeddle with the subject of exports."

In the case of *Fairbanks* v. *United States,* 181 U. S., 283; 21 Sup. Ct. Rep., 648, 652, to which case a more extensive reference will be made hereafter, this court, in discussing this same provision of the Constitution, after referring to these attempted amendments of the clause, says:

> "So, it is clear that the framers of the Constitution intended not merely that exports should not be made a source of revenue to the national government, but that the national government should put nothing in the way of burden upon such exports. If all exports must be free from national tax or duty such freedom requires, not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens the exportation."

It being clear that the purpose of this restriction was to prevent an unjust discrimination between the states by prohibiting the levy of any tax by the general government upon the natural products exported from any one section of the country whereby an unequal burden would be imposed upon the states producing such commodities, how could such purpose be accomplished if an internal revenue collector, in enforcing the general revenue laws, may levy and collect such tax upon goods produced in a given locality, regardless of the fact as to whether or not such goods may be intended for export, or whether or not they may be subsequently exported and sold in a foreign market?

The facts of this case as they appear in the declaration, all of which so far as well pleaded, are admitted by the demurrer, seem clearly to entitle plaintiffs in error to the benefit of this provision of the Constitution. McHenry county, where their factories are located, is in close prox-

imity to Elgin, Illinois, the recognized center of the dairying interests of this country. The Elgin market is accepted throughout the country as controlling absolutely the prices of dairy and creamery butter, which is one of the principal products of the dairying industry. "Filled cheese," as defined and treated in the Act of June 6th, 1896, under consideration, is manufactured from skimmed milk, or milk from which the cream or butter fat has first been removed by mechanical process for the purpose of manufacturing the same into creamery butter. Filled cheese, therefore, is necessarily a product of those communities where creamery butter is the chief dairy product. If, then, this provision of the Constitution can be so construed as to require manufacturers of filled cheese, who manufacture for export trade and export the same and sell it in foreign markets, to pay an internal revenue tax on such filled cheese so exported, the object of the framers of the Constitution in inserting this provision may be entirely defeated, for clearly such a construction would impose upon the communities or states which produce filled cheese, a tax burden which is not imposed by present existing laws upon cotton, wool, grain, minerals, and many other articles which are the staple products of various other states of the Union in which no filled cheese is produced.

It appears from the declaration in this case that the filled cheese in question was manufactured under contracts previously made in London and Liverpool, England, to be exported to England; that it was manufactured for the express purpose of filling such contracts; and that as soon as each installment or quantity required by said contracts was manufactured the same was exported direct from the factories, and was actually sold and delivered in London and Liverpool, England. It would seem that these facts bring the

case very clearly within the provision of the Constitution and that the levy and collection of the tax in question is, therefore, not only unwarranted, but was actually forbidden by law.

It is undoubtedly a rule of construction, applicable to this question, that the provisions of the Constitution must receive a reasonable interpretation, and that the same rule of construction should be applied to provisions limiting the powers of Congress, that is applied to provisions granting powers to Congress.

Story on the Constitution, Sec. 419, says:

> "From the foregoing considerations we deduce the conclusion that, as a frame or fundamental law of government, the Constitution of the United States is to receive a reasonable interpretation of its language and its powers, keeping in view the objects and purposes for which those powers were conferred. By a reasonable interpretation we mean that, in case the words are susceptible of two different senses, the one strict, the other more enlarged, that should be adopted which is most consonant with the apparent objects and intent of the Constitution; that which will give efficacy and force as a *government,* rather than that which will impair its operations and reduce it to a state of imbecility. Of course, we do not mean that the words for this purpose are to be strained beyond their common and natural sense, but, keeping within that limit, the exposition is to have a fair and just latitude so as on the one hand to avoid obvious mischief, and on the other hand to promote the public good."

In the case of *Fairbanks* v. *U. S.*, already referred to, in discussing the subject of constitutional limitations upon the powers of Congress the court, 21 Sup. Ct. Rep., on page 650, after referring to the above rule, said:

> "We are not here confronted with a question of the

extent of the powers of Congress, but one of the limitations imposed by the Constitution on its action, and it seems to us clear that the same rule and spirit of construction must also be recognized. If powers granted are to be taken as broadly granted, and as taking with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words, if the Constitution, in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed, and that language of restriction is to be narrowly and technically construed; * * * * the true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose."

In view of the manifest purpose of this provision of the Constitution, as laid down by Mr. Story and as heretofore recognized by this court, and of the rules of construction which have also been adopted by this court, as above indicated, it would seem that a proper construction of this clause of the Constitution ought to prevent the taxation by the general government of any articles actually exported from any state.

So far as we are able to discover this question in this precise form has never been presented to this court; probably for the reason that the act in question levying an internal revenue tax upon filled cheese seems to be the only internal revenue act ever passed by Congress which failed to provide for the exportation of the commodity taxed without the payment of the tax. The case of *Pace* v. *Burgess*,

92 U. S., 372; 23 L. ed., 657, 659, however, seems to have a bearing upon the question. This was a suit brought against a collector to recover moneys paid by a manufacturer of tobacco for stamps issued by the department under the Acts of July 20th, 1868 (15 Stat., at L. 157) and of June 6th, 1872 (17 Stat. at L., 254) and used upon tobacco manufactured for export trade, for the purpose of distinguishing it from tobacco intended for domestic trade, the acts providing that an export stamp of that character, for which a nominal price was charged, should be procured and affixed to each package which was for exportation, merely as a distinguishing stamp and not as a tax.

The constitutionality of the act was brought into question and the court, in disposing of that contention, used the following language:

> "The plaintiff contends that the charge for the stamps, required to be placed on packages of manufactured tobacco intended for exportation, was and is a duty on exports, within the meaning of that clause in the Constitution of the United States which declares that 'No tax or duty shall be laid on articles exported from any state.' But it is manifest that such is not its character or object. The stamp was intended for no other purpose than to separate and identify the tobacco which the manufacturer desired to export, and thereby, instead of taxing it, to relieve it from the taxation to which other tobacco was subjected. It was a means devised to prevent fraud, and to secure the faithful carrying out of the declared intent with regard to the tobacco so marked. The payment of twenty-five cents or ten cents for the stamp used was no more a tax on the export than was the fee for clearing the vessel in which it was transported, or for making out and certifying the manifest of the cargo. It bore no proportion whatever to the quantity or value of the package on which it was affixed. These were unlimit-

ed, except by the discretion of the exporter or the convenience of handling. The large amount paid for such stamps by the plaintiff only shows that he was carrying on an immense business.

"The evidence given to show that the original cost of the stamps was never less than the amount paid for them by the manufacturers, is entitled to very slight consideration. The cost of the paper, ink and printing formed but a small part of the expense of those arrangements which were necessary in order to give to the exporter the benefit of exemption from taxation, and at the same time to secure the necessary precautions against the perpetration of fraud. We know how next to impossible it is to prevent fraudulent practices wherever the internal revenue is concerned; and the pretext of intending to export such an article as manufactured tobacco would open the widest door to such practices, if the greatest strictness and precaution were not observed. The proper fees accruing in the due administration of the laws and regulations necessary to be observed to protect the government from imposition and fraud likely to be committed under pretense of exportation are in no sense a duty on exportation. They are simply the compensation given for services properly rendered. The rule by which they are estimated may be an arbitrary one; but an arbitrary rule may be more convenient and less onerous than any other which can be adopted. *The point to guard against is the imposition of a duty under the pretext of fixing a fee.* In the case under consideration, having due regard for that latitude of discretion which the legislature is entitled to exercise in the selection of the means for attaining a constitutional object, we can not say that the charge imposed is excessive, *or that it amounts to an infringement of the constitutional provision referred to. We can not say that it is a tax or duty instead of what it purports to be,* a fee or charge, for the employment of that instrumentality which the circumstances of the case render necessary for the protection of the government.

In that case the court clearly recognized the right of the exporter to exemption from taxation under this provision of the Constitution in very strong terms when it said that *the imposition of a duty under the pretext of fixing a fee is a point to be guarded against.*

The case of *Fairbanks* v. *United States,* 181 U. S., 283; 21 Sup. Ct. Rep., 648, already referred to, was a criminal prosecution brought by the government against Fairbanks, an agent of the Northern Pacific Railway Company, for violating the provisions of the Spanish War Revenue Act of June 6th, 1898, which required a 10 cent revenue stamp to be placed upon all foreign bills of lading. It was contended on behalf of the defendant that the act was in violation of the clause of the Constitution now under consideration, and that the levying of an internal revenue tax upon a foreign bill of lading was in fact a tax upon the articles exported and consigned under the bill of lading. Mr. Justice Brewer, in discussing this clause of the Constitution, on page 651, 21 Sup. Ct. Rep., uses the following language:

> "The requirement of the Constitution is that exports should be free from any governmental burden. The language is 'no tax or duty.' Whether such provision is or is not wise is a question of policy with which the courts have nothing to do. We know historically that it was one of the compromises which entered into and made possible the adoption of the Constitution. It is a restriction on the power of Congress; and, as, in accordance with the rules heretofore noticed, the grants of powers should be so construed as to give full efficacy to those powers and enable Congress to use such means as it deems necessary to carry them into effect, so in like manner a restriction should be enforced in accordance with its letter and spirit, and no legislation can be tolerated which, although it may not conflict with the letter, destroys the spirit and purpose

of the restriction imposed. If, for instance, Congress may place a stamp duty of 10 cents on bills of lading on goods to be exported, it is because it has power to do so; and if it has power to impose this amount of stamp duty it has like power to impose any sum in the way of stamp duty which it sees fit. And it needs but a moment's reflection to show that thereby it can as effectually place a burden upon exports as though it placed a tax directly upon the articles exported. It can, for the purpose of revenue, receive just as much as though it placed a duty directly upon the articles, and it can just as fully restrict the free exportation which was one of the purposes of the Constitution."

Then follows a discussion of the alleged difference between requiring a revenue stamp to be fixed to a bill of lading and the imposition of a tax upon the articles themselves which are consigned under such bill of lading, and in the course of that discussion the Court quoted from and commented upon the argument of counsel for the government in the following manner:

"Counsel for the government, in his interpretation of the scope and meaning of this constitutional limitation, says:

" 'To give Congress the power to lay a tax or duty on articles exported from any State meant to authorize inequality as among the States in the matter of taxation. If the north happened in control in Congress, it might tax the staples of the south; if the south were in power it might place a duty on the exports of the north. As a part, therefore, of the great compromise between the north and the south, this clause was inserted in the Constitution. The prohibition was applied, not to the taxing of the act of exportation or the document evidencing the receipt of goods for export, for these exist with substantial uniformity throughout the country, but to the laying of a tax or

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duty on the *articles exported,* for these could not be taxed without discriminating against some States and in favor of others.'

"This argument does not commend itself to our judgment. Its implication is that the sole purpose of this constitutional restriction was to prevent the discrimination between the States by imposing an export tax on certain articles which might be a product of only a few of the States, and which should be enforced only so far as necessary to prevent such discrimination. If mere discrimination between the States was all that was contemplated it would seem to follow that an *ad valorem* tax upon all exports would not be obnoxious to the constitutional prohibition. But surely under this limitation Congress can impose an export tax neither on one article of export, nor on all articles of export. In other words, the purpose of the restriction is that exportation—all exportation—shall be free from national burden. This intent, although obvious from the language of the clause itself, is reinforced by the fact that in the constitutional convention Mr. Clymer moved to insert after the word 'duty' the words 'for the purpose of revenue,' but the motion was voted down."

The case of *Dooley* v. *U. S.,* 183 U. S., 151; 22 Sup. Ct. Rep., 62, involved the constitutionality of the Foraker Act, so far as it fixes duties to be paid upon merchandise imported into Porto Rico from the port of New York.

This clause of the Constitution was frequently referred to in both the majority and dissenting opinions, and Mr. Justice Brown, in delivering the majority opinion, after discussing the question as to whether or not goods shipped from New York to Porto Rico were exported, said:

"In another view, however, the case presented by the record is whether a duty laid by Congress upon goods arriving at Porto Rico from New York is a duty upon an export from New York, or upon an im-

port from Porto Rico. The fact that the duty is exacted upon the arrival of the goods at San Juan certainly creates a presumption in favor of the latter theory. At the same time it is possible that it may also be a duty upon an export. The mere fact that the duty is not laid at the port of departure is by no means decisive against its being such. It is too clear for argument that if vessels bound for a foreign country were compelled to stop at an intermediate port and pay into the treasury of the United States a duty upon their cargoes, such duty would be a tax upon an export, and the place of its exaction would be of little significance. The manner in which and the place at which the tax is levied are of minor consequence."

From the above language it would seem that it makes no difference where or when the tax is laid and collected, as the Court said: "The manner in which and the place at which the tax is levied are of minor consequence," all of which would indicate that no tax could at any time be properly laid upon articles exported, either before or after exportation had actually commenced.

In the license tax cases, 5 Wall., 462, 471; 18 L. Ed., 497, 500, Chief Justice Chase, in discussing the powers of Congress under the Constitution to lay and collect taxes, duties, imposts and excises, said:

> "It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution with only one exception and only two qualifications. *Congress can not tax exports;* and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only it reaches every subject, and may be exercised at discretion."

It will undoubtedly be argued in this case on behalf of the government, that under a proper construction of this

provision of the Constitution a tax may not be levied by the general government upon articles exported simply because they are exported, but that a collector, under the provisions of the Act in question regulating filled cheese, might properly assess and collect such tax at any time before exportation had actually begun, and the case of *Turpin* v. *Burgess*, 117 U. S., 504; 29 L. Ed., 988, will undoubtedly be cited in support of such contention.

Although no formal opinion was filed in this case in the Court below, it was understood that the trial court ruled in favor of the defendant on the strength of this case of *Turpin* v. *Burgess* and it may not be improper, therefore, for us to refer to and consider that case in this connection.

Turpin v. *Burgess*, like the case of *Pace* v. *Burgess* above cited, was a suit brought against a collector to recover various amounts paid for export stamps of the same character as those involved in the former *Burgess* suit. The opinion in this latter *Burgess* case was delivered by Mr. Justice Bradley, who also delivered the opinion of the Court in the former case, and, after stating the facts in the case on page 989 (29 L. Ed.) said:

> "We had occasion to examine the very question raised in this case in *Pace* v. *Burgess*, reported in 92 U. S., 372, and were unanimously of opinion that the Act requiring the exportation stamp complained of was a valid and constitutional act. The reasons for that decision were given at length in the report of that case, and we see no occasion to modify the views then expressed. The finding of facts so called, made by the Court in the present case by consent of the parties who waived a jury, does not change the character of the question. Every fact now found was assumed or virtually involved in the former case."

Having thus disposed of the case upon a previous ruling of the Court, which has since been reviewed and adhered

to by the Court in the case of *Fairbanks* v. *U. S., supra,* Mr. Justice Bradley then proceeds to put the decision *also* upon a new and different ground from that considered in the former *Burgess* case and says:

> "There is another view of this subject, however, independent of the considerations which governed our former decision, which is equally decisive of this case. We have lately decided in *Coe* v. *Errol* that goods intended for exportation to another State are liable to taxation as part of the general mass of property of the State of their origin until actually started in course of transportation to the State of their destination, or delivered to a common carrier for that purpose, provided they are taxed in the usual way in which such property is taxed, and not taxed by reason or because of such exportation or intended exportation."

The balance of the opinion which follows the above quotation is based entirely upon the case of *Coe* v. *Errol* and all that was said in that connection was manifestly unnecessary to a proper decision of the case, and consequently may be considered as *obiter dicta.*

The case of *Coe* v. *Errol* was a suit brought in New Hampshire in the State Court for an abatement of a general State, County, Town, School and Highway tax, which had been levied upon a quantity of saw logs, some of which had been cut within the State of New Hampshire and brought to the bank of a river within the jurisdiction of the town by which the tax had been levied, for the purpose of floating them down the river to another State; and the balance of the logs had been cut in the State of Maine and floated down the same river through the State of New Hampshire enroute to a mill in the State of Maine, and had arrived at the same point where the other logs cut in New Hampshire had been landed, and all the logs cut in

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Maine, as well as those cut in New Hampshire, had been held at this point on account of low water.

The logs were all owned by the same parties, who were nonresidents of the State of New Hampshire, and who resided in the States of Maine and Massachusetts.

It so happened that the logs cut in Maine, as well as those cut in New Hampshire, were within the jurisdiction of the town at the time this general State, County, Town, School and Highway tax was levied, and the date on which, under the laws of New Hampshire, such taxes attached to all property within the State.

It was held by the New Hampshire Court that the town could not levy a tax upon the logs which were merely held up temporarily while enroute through the State; but they also held that the logs which had been cut within the State, although already delivered on the banks of the river for the purpose of transporting or floating them down the river into another State, were still a part of the mass of property of the State, and subject to tax within the State so long as the process of transportation had not already commenced at the time the tax became fixed by the laws of the State.

It was contended on the part of the owners of the logs that the tax upon the logs cut in New Hampshire was unauthorized and was a violation of paragraph 2, section 10, article 1, of the Federal Constitution, which provides that "no State shall without the consent of Congress lay any imposts or duties on imports or exports"; and it was also contended that the levy of the tax was a violation of that section of the Federal Constitution which provides that "Congress shall have power * * * to regulate commerce with foreign nations and among the several States."

The opinion of the Court in the case of *Coe* v. *Errol* was also delivered by Mr. Justice Bradley, and it is quite as

difficult to understand why, under the facts in that case, the clause of the Federal Constitution which provides that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports," should have been considered in that case at all as it is to understand why the case of *Coe* v. *Errol* should have been applied in the decision of the latter *Burgess* case.

Prior to the decision of *Coe* v. *Errol* it had been decided in the case of *Woodruff* v. *Parham,* 8 Wall., 123; 19 L. ed., 382, that the words "imports" and "exports," as used in the Constitution, were used to define the shipment of articles between this and foreign countries, and not such shipments between the States; nevertheless, in the opinion in *Coe* v. *Errol* Mr. Justice Bradley, after eliminating from the case the fact of the owners being nonresidents, said:

> "We recur, then to a consideration of the question freed from this limitation: Are the products of a State, although intended for exportation to another State and partially prepared for that purpose by being deposited at a place or port of shipment within the State, liable to be taxed like other property within the State?
>
> "Do the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution.
>
> "This question does not present the predicament of goods in course of transportation through a State, although detained for a time within the State by low water or other causes of delay, as was the case of the logs cut in the State of Maine, the tax on which was abated by the Supreme Court of New Hampshire. Such goods are already in the course of commercial transportation and are clearly under the protection of the Constitution. And so, we think, would the goods in question be when actually started in the course of

transportation to another State, or delivered to a carrier for such transportation. There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an *entrepot* of that particular region, whether on a river or a line of railroad, such products are not yet exports nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is unreasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the State.

"Of course, they can not be taxed as exports; that is to say, they can not be taxed by reason or because of their exportation or intended exportation; for that would amount to laying a duty on exports, and would be a plain infraction of the Constitution, which prohibits any State, without the consent of Congress, from laying any imposts or duties on imports or exports; and, although it has been decided, *Woodruff* v. *Parham*, 8 Wall., 123 (75 U. S., bk. 19; L. ed., 382), that this clause relates to imports from and exports to foreign countries, yet, when such imposts or duties are laid on imports or exports from one State to another, it can not be doubted that such an imposition would be a regulation of commerce among the States and,

therefore, void as an invasion of the exclusive power of Congress. See *Walling* v. *Michigan* (ante 691), decided at the present term, and cases cited in the opinion in that case. But if such goods are not taxed as exports, nor by reason of their exportation or intended exportation, but are taxed as part of the general mass of property in the State, at the regular period of assessment of such property and in the usual manner, they not being in course of transportation at the time, is there any valid reason why they should not be taxed? Although intended for exportation, they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion for some place out of the State, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the State? If assessed in an exceptional time or manner, because of their anticipated departure, they might well be considered as taxed by reason of their exportation or intended exportation; but if assessed in the usual way, when not under motion or shipment, we do not see why the assessment may not be valid and binding." (116 U. S., 517; 29 L. ed., 715.)

What the Court really decided in *Coe* v. *Errol* is not whether the intention of the owner or manufacturer of certain articles to export them would exempt them from liability to taxation by the State authorities by reason of the restriction contained in Paragraph 2, Section 10, Article 1 of the Constitution, but rather whether the intention of such owner or manufacturer to ship such goods from one State to another, by means of interstate commerce, would, before such transportation actually commenced, exempt the goods from taxation by the State authorities by reason of the provisions of the Constitution which gives to Congress power to regulate commerce with foreign nations and

among the several States, a principle which has now become thoroughly established by frequent decisions of this and other federal courts.

The frequent use of the word "export" in the opinion in *Coe* v. *Errol*, when no exports were involved in the case, quite naturally led to confusion, and was probably the sole cause of the attempted application of a question of interstate commerce in the latter *Burgess* case, while construing the provisions of the Constitution, which denies to Congress the power to lay taxes or duties on articles exported from any State.

Although in *Coe* v. *Errol* and in numerous other subsequent decisions, the principle has been firmly established that a State has absolute control over the property within its borders until transportation to a foreign State by means of interstate commerce has actually commenced, at which time the property comes within the protection of the law of the Federal government, and such property continues under the protection of the Federal government by virtue of its power to regulate commerce between the States until such goods have reached their destination and are sold and have become mingled with the mass of property of the State of their destination; what possible application can this principle have in determining whether an internal revenue collector may, in the discharge of his duties as an officer of the government, levy and collect an internal revenue tax upon articles which are about to be exported, and which are subsequently exported and sold in a foreign market? The question before the Court in this case is not a question involving interstate commerce, but one of international commerce or exportation, in its most comprehensive sense; therefore, the rule which makes it necessary to fix some time when the power or authority of the State over

property affected by interstate commerce, ceases, and when the powers of the general government attach, can have no application in determining this question as it is a question of exportation pure and simple, and not in any sense one of interstate commerce.

But more than that, under the facts set forth in the declaration in this case, there was no time when any rule applicable to interstate commerce could be applied because the collector, knowing that the goods were about to be exported, refused to permit them to be delivered to a carrier for transportation until the tax had first been paid, and threatened plaintiffs in error with arrest and prosecution if such goods were so delivered for transportation and forwarded without the payment of the tax, thus absolutely preventing the act of transportation, and so, acting under this compulsion, and in fear of arrest and prosecution by the collector, they yielded to his requirement under protest and paid the tax by purchasing and attaching the stamps required on the very day that the goods were delivered into the hands of the carrier for transportation, in order that their original purpose of transportation and exportation might not be interfered with, and the contracts made long prior thereto might be fulfilled.

It would seem, therefore, that the principle of interstate commerce, as applied in the case of *Coe* v. *Errol,* and other subsequent cases, and further, that what was said in *Turpin* v. *Burgess,* by way of an application of that principle to that case, was not only *obiter dicta,* but has absolutely no application to this case.

But it is clear that the trial court, in applying the case of *Turpin* v. *Burgess,* lost sight of the distinction between this case and *Coe* v. *Errol,* and that the exportation or non-exportation of this filled cheese did not rest merely in the

intention of the plaintiffs in error to export the same, but they were absolutely bound, under their contracts, as already shown, to export it, and surely there is no reason why a presumption should be indulged that they would violate their contract and not actually export this filled cheese, as they were bound to do under the terms of their agreement. The language of Mr. Justice Bradley in *Coe* v. *Errol,* viz.: "Although intended for exportation they may never be exported; the owner has a perfect right to change his mind, and until actually put in motion for some place out of the State, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the State?" can therefore have no application to this case; plaintiff's in error were under solemn obligation to export their filled cheese, which would not permit them to change their minds. While we thoroughly and sincerely believe that this provision of the Constitution forbids the levy and collection of any tax upon articles *which are exported,* whether manufactured expressly for exportation or not, and that this clause carefully construed, does not mean simply that such tax shall not be levied merely because of such exportation; at the same time it seems apparent, from the facts appearing in this record, that the taxes in this case were levied and collected at the times complained of simply because this filled cheese was about to be delivered to a transportation company to be exported to a foreign country.

In this connection we also desire to direct the Court's attention to the case of *Brown* v. *Houston,* 114 U. S., 622; 29 L. ed., 257. It appeared in that case that plaintiffs were miners and dealers in coal at Pittsburg, and had shipped a large quantity of coal on flat boats down the Mississippi and Ohio Rivers to their agents at New Or-

leans, to be sold by them in cargo lots. After the arrival of the cargoes at New Orleans a general state tax under the laws of Louisiana was assessed upon the coal, and suit was brought by the owners to enjoin the collection of the tax. The opinion, which was delivered by Mr. Justice Bradley, reaffirms the doctrine laid down in *Woodruff* v. *Parham* that the words "imports" and "exports," as used in the Constitution, relate only to exports to and imports from foreign countries, which disposed of one of the contentions in that case, viz.: that the coal in question was imported into the State of Louisiana, and therefore, could not be taxed by the State by reason of Section 10, Article 1, of the Federal Constitution, which provides that no State, without consent of Congress, shall levy any tax on imports or exports.

It was claimed in the evidence in that case that certain portions of this coal had been exported after the filing of the bill, and before the hearing and in disposing of this feature of the case the Court said:

> "When the petition was filed the coal was lying in New Orleans, in the hands of Brown & Jones, for sale. The petition states this in so many words, and Rootes testified the same thing, and adds that it was to be sold by the flat boat load. He also adds that at the time of his examination more than half of it had been exported to foreign countries; but he probably means that it had been sold to steamers sailing to foreign ports for use on the same, and had only been exported in that way. The complainants were not exporters; they did not hold the coal at New Orleans for exportation, but for sale there. Being in New Orleans and held there on sale, without reference to the destination, or use which the purchasers might wish to make of it, it was taxed in the hands of the owners (or their agents) like all other property in the city, six mills on the dollar. If, after this, and after being sold, the purchaser thought proper to put it on board of a

steamer bound to foreign parts, that did not alter the character of the taxation so as to convert it from a general tax to a duty on exports. When taxed it was not held with the intent or for the purpose of exportation but with the intent and for the purpose of sale there, in New Orleans. A duty on exports must either be a duty levied on goods as a condition, or by reason of their exportation, or, at least, a direct tax or duty on goods which are intended for exportation. Whether the last would be a duty on exports, it is not necessary to determine. But certainly, where a general tax is laid on all property alike, it can not be construed as a duty on exports when falling upon goods not then intended for exportation, though they should happen to be exported afterwards. This is the most that can be said for the goods in question, and we are therefore of opinion that the tax was not a duty on exports any more than it was a duty on imports, within the meaning of those terms in the clause under consideration."

There is a vast difference between a general state tax and an internal revenue or impost tax or duty; the former is a uniform *ad valorem* tax assessed on all property within the State at the time the assessment is made, while the latter is an arbitrary amount fixed upon the property by measurement, regardless of the value, and is in the nature of a license exacted from a manufacturer or importer for the privilege of manufacturing or importing the goods affected by such tax.

All personal property is subject to a general state tax by the State within which it is located at the time such taxes are levied, and an internal revenue tax is imposed and operates as an additional burden, and this is undoubtedly what the Court referred to in *Brown* v. *Houston* when it said: "Where a general tax is laid on all property alike it can not be construed as a duty on exports when falling on

goods not intended for exportation, though they should happen to be exported afterwards." Undoubtedly a pretended general tax levied by a State on goods within its borders, not in the regular or usual way, but solely by reason of the intended exportation of such goods, would be tantamount to a duty on exports, and therefore, void. But is it true, or does it follow that an internal revenue tax, in order to operate as a tax on articles exported, must be levied by reason of the exportation or intended exportation of such articles?

The language of Mr. Chief Justice Marshall in *Brown* v. *Maryland,* 12 Wheat., 437; 6 L. ed., 685, does not so indicate. That case arose under that section of the Federal Constitution which provides that no State, without consent of Congress, shall lay any imposts or duties on imports or exports, and involved the constitutionality of a law of Maryland, which required importers of foreign goods to pay a license fee to the State authorities. In discussing this question the Chief Justice said:

> "An impost, or duty on imports, is a custom or tax levied on articles brought into a country, and is most usually secured before an importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles if it were to be levied on them after they were landed. The policy and consequent practice of levying or securing the duty before or on entering the port does not limit the power to that state of things, nor, consequently, the prohibition, unless the true meaning of the clause so confines it. What then are 'imports'? The lexicon informs us they are 'things imported.' If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles

themselves which are brought into the country. 'A duty on imports,' then is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered a country."

And the language of the present Chief Justice in the case of *Dooley* v. *U. S. supra* is to the same effect. Having quoted the foregoing language from *Brown* v. *Maryland,* he said:

> "And so of exports. They are the things exported—the articles themselves. *A duty on exports is not merely a duty on the act of exportation, but is a duty on the article exported, and the article exported* remains such until it has reached its final destination. The place of collection is purely incidental, and immaterial on the question of power."

So also the language of Mr. Justice Brewer in *Fairbanks* v. *U. S., supra,* when he said:

> "The requirement of the Constitution is that exports should be free from any governmental burden. The language is 'no tax or duty' * * * If, for instance, Congress may place a stamp duty of 10 cents on bills of lading on goods to be exported it is because it has power to do so; and if it has power to impose this amount of stamp duty, it has power to impose any sum in the way of stamp duty which it sees fit. And it needs but a moment's reflection to show that thereby it can as effectually place a burden upon exports as though it placed a tax directly upon the articles exported. It can, for the purposes of revenue, just as much as though it placed a duty directly upon the articles, and it can just as fully restrict the free exportation, which was one of the purposes of the Constitution."

Thus we have endeavored to show that the case at bar is quite different from a case where a general tax is laid on all property alike. An internal revenue tax on filled cheese, not based on its value and made in addition to the regular State and County taxes on all property within the State at the time such tax is laid, is not a general tax on all property alike, but simply a tax laid upon one product, which leaves a vast number of the natural products of other States and communities wholly and entirely untaxed. This of itself is a sufficient reason why *Coe* v. *Errol* and *Brown* v. *Houston* have no application to this case.

There is also a distinction between the term "tax" and "duty" as used in this clause of the Constitution, which should be taken into consideration in this connection.

In Story on the Constitution, Sec. 952, with reference to the word "duties," the author says:

> "In its large sense it is very nearly an equivalent to taxes."

In *Pacific Ins. Co.* v. *Soule*, 7 Wall., 433; 19 L. ed., 95, 99, the court, considering the term "duties," said:

> "*Duties* are defined by Tomlin to be things due and recoverable by law. The term in its widest signification is hardly less comprehensive than 'taxes.' It is applied in its most restricted meaning to customs; and in that sense is nearly the synonym of 'imposts.' Tomlin Dic. 'Duty;' 1 Story Const., Sec. 952; *Hylton* v. *U. S.*, 3 Dall., 171.
>
> "*Impost* is a duty on imported goods and merchandise. In a larger sense, it is any tax or imposition. Story Const. Abr., Sec. 474. Colwell says it is distinguished from custom, 'because custom is rather the profit which the prince makes on goods shipped out.' Colwell Interpreter, tit. 'Impost.' Mr. Madison considered the terms 'duties' and 'imposts' in these clauses

as synonymous. 1 Story Const., 669, n. Judge Tucker thought 'they were probably intended to comprehend every species of tax or contribution not included under the ordinary terms, "taxes and excises."'"

It would seem, therefore, that the term "duty" is applied when a tax is laid or exacted upon property by reason of some change in the position of such property, either by its being sent out of the country, or brought into the country, while the term "tax" is more general, and may be applied to any charge imposed under any circumstances upon persons or property to raise money for public purposes.

See

Savings & Loan Assn. v. *Topeka,* 20 Wall., 655; 22 L. ed., 455, 461.

Undoubtedly the court had this distinction in mind when it said in *Brown* v. *Houston* "A duty on exports must either "be a duty levied on goods as a condition or by reason of "their exportation, or at least a direct tax or duty on goods "which are intended for exportation."

A general tax levied on property not in the usual and ordinary way, but by reason of its intended exportation, if such a thing were possible, would undoubtedly be a duty, for the reason that the fact or occasion which would thus give rise to the levy of the tax would be its change of position or exportation to another country.

So it may be said that any tax which the government might attempt to lay upon the property of any state, by reason of its intended exportation, would be a duty because the occasion which would give rise to the levy of such tax would be the change of position of the property or its exportation. This, it will be conceded, however, could not be done.

But, under the Constitution, the government can lay

neither tax nor duty on any property exported, and consequently it must follow that no tax can be laid, either before or after exportation has actually commenced.

In *Dooley* v. *U. S., supra,* Mr. Chief Justice Fuller, in delivering the dissenting opinion, said:

> "The prohibition on Congress is explicit and noticeably different from the prohibition on the states. The state is forbidden to lay any 'imposts or duties;' Congress is forbidden to lay any 'tax or duty.' The state is forbidden from laying imposts or duties on imports or exports; that is, articles coming into or going out of the United States. Congress is forbidden to tax articles exported from any state."

We submit, therefore, that *Coe* v. *Errol* and *Brown* v. *Houston* have no application for the following reasons, viz.:

1. They involve questions of interstate commerce and do not in any sense involve the question of exportation.

2. A general tax is an *ad valorem* tax, while an internal revenue tax is in addition to a general tax, and the amount is not determined by the value of the property affected, and is, therefore, not uniform, but is a discriminating tax.

3. The application of these cases to questions of internal revenue would always defeat exemption from taxation under the Constitution by preventing the delivery to a carrier for exportation until the tax had first been paid.

4. It is not necessary that an internal revenue tax, in order to operate as a tax on articles exported, should be laid on such articles by reason of their exportation, or intended exportation; any government tax on such articles is a burden on exportation and, therefore, contrary to the spirit of the Constitution.

5. A general state tax like that involved in those cases would be a duty, if levied because of exportation; but Con-

gress is prohibited from laying either tax or duty on articles exported.

Whether the collector in this case simply misconceived what his duties under the law were, or whether the Act of June 6, 1896, in question, is unconstitutional, it seems clear that by a fair and reasonable construction the tax was wrongfully exacted, because it was prohibited by this provision of the Federal Constitution.

(2)

This provision of the Constitution is self executing.

The rule is that provisions of a Constitution which are prohibitory, and need no action on the part of the legislature to give them effect, are self executing. This provision of the Constitution is clearly prohibitory and, therefore, must be a self executing provision.

The question of self executing provisions in a Constitution seems to have been first presented to this Court in the case of *Groves* v. *Slaughter,* 15 Pet., 449; 10 L. ed., 801, 819. That case involved the construction of a clause in the Constitution of the State of Mississippi, which was as follows:

> "The introduction of slaves into this State as merchandise, or for sale, shall be prohibited from and after the first day of May, 1833."

It was urged in that case that this provision of the Constitution needed no act of the Legislature to give it effect, and that it was therefore self executing; but the Court, although recognizing that principle, held that that particular clause was not self executing because it was not complete in itself, but required some act of the Legislature to give it effect, as the language was that the introduction of slaves, etc., "shall be prohibited"; that is, that the Legislature of

the State, by an appropriate act, should prohibit such introduction of slaves, on and after the date specified.

The Court will observe that the language of the provision of the Constitution involved in this case is "no tax or duty shall be laid," which is an absolute prohibition in itself and manifestly could not require an act of Congress to give it effect.

On the contrary, it prohibits any action whatever on the part of Congress upon the subject.

A more recent case upon this question is that of *Davis* v. *Burke*, 179 U. S., 399; 21 Sup. Ct. Rep., 210. That case involved the construction of a provision of the Constitution of the State of Idaho, which is as follows:

> "No person shall be held to answer for any felony or criminal offense of any grade unless," etc.

The Court said:

> "But we are also of opinion that for the purposes of this case the provisions of the Idaho Constitution must be deemed self executing. The rule is thus stated by Judge Cooley in his work upon Constitutional Limitations (p. 99): 'A constitutional provision may be said to be self executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law. Thus a Constitution may very clearly require county and town government; but if it fails to indicate its range, and to provide proper machinery, it is not in this particular self executing, and legislation is essential.'
>
> "Where a constitutional provision is complete in itself it needs no further legislation to put it in force. When it lays down certain general principles, as to

enact laws upon a certain subject, or for the incorporation of cities of certain population, or for uniform laws upon the subject of taxation, it may need more specific legislation to make it operative. In other words, it is self executing only so far as it is susceptible of execution. But where a constitution asserts a certain right, or lays down a certain principle of law or procedure, it speaks for the entire people as their supreme law, and is full authority for all that is done in pursuance of its provision. In short, if complete in itself, it executes itself."

Se also *Law* v. *People*, 87 Ill., 385, 392.
Wash. Home v. *City*, 157 Ill., 414, 426.
Fuller v. *Chicago*, 89 Ill., 282.

Approved by this Court in:

Buchanan v. *Litchfield*, 102 U. S., 278; 26 L. ed., 138.

The same principle is also upheld by this Court in:

Board of Lake Co. Comm. v. *Rollins*, 103 U. S., 662; 32 L. ed., 1060.
Dixon County v. *Field*, 111 U. S., 83; 28 L. ed., 360.
Doon Township v. *Cummins*, 142 U. S., 370; 12 Sup. Ct. Rep., 220.

(3)

This provision of the Constitution and the Act of June 6th, 1896, like statutes in pari materia, must be construed together, and taken together they constitute the law governing the powers and duties of the revenue officers of the government.

This provision of the Constitution being self executing it is as much a rule of action governing the conduct and defining the duties of the government officials as any Act

of Congress, and indeed should be much more strictly observed and followed by them, because the Constitution outranks and is over and above all legislation.

Cooley on Constitutional Limitations, page 3, says:

> "In American constitutional law the word *Constitution* is used in a restricted sense as implying the written instrument agreed upon by the people of the Union, or of any one of the States, as the absolute rule of action and decision for all departments and officers of the government in respect to all the points covered by it which must control, until it shall be changed by the authority which established it, and in opposition to which any act or regulation of any such department or officer, or even the people themselves, will be altogether void."

In Story on the Constitution, Sec. 374, the author says:

> "The Constitution, contemplating the grant of limited powers, and distributing them among various functionaries,—and the State governments, with their functionaries, being also clothed with limited powers, subordinate to those granted to the general government, —whenever any question arises as to the exercise of any power by any of these functionaries under the State or Federal government, it is of necessity that such functionaries must, in the first instance, decide upon the constitutionality of the exercise of such power. It may arise in the course of the discharge of the functions of any one, or of all, of the great departments of government, the executive, the legislative, and the judicial. The officers of each of these departments are equally bound by their oaths of office to support the Constitution of the United States, and are, therefore, conscientiously bound to abstain from all acts which are inconsistent with it. Whenever, therefore, they are required to act in a case not hitherto settled by any proper authority, these functionaries must, in

the first instance, decide each for himself, whether, consistently with the Constitution, the act can be done."

An officer of the government, whose duty it is to see to the enforcement of the law, having sworn to support the Constitution, in determining what his duties are, must look not only to the law upon the statute book, but also to the Constitution, which is the fundamental law upon which all statutes rest, and when there are Acts of Congress and provisions of the Constitution relating to the same subject, it is his duty to consider and construe the same together.

The case of *Cooper Manufacturing Company* v. *Ferguson*, 113 U. S., 727; 28 L. ed., 1137, was a suit brought by an Ohio corporation against parties residing and doing business in Colorado, to recover the price of certain machinery manufactured in Ohio, and sold and delivered in Colorado.

It appeared that the Constitution of Colorado contained this provision: "No foreign corporation shall do any business in this State without having one or more known places of business, and authorized agent or agents in the same, upon whom process may be served."

In accordance with this provision of the Constitution the Legislature of Colorado had passed an Act requiring foreign corporations, before they were authorized or permitted to do business in the State, to appoint an agent, etc., but this Ohio corporation had never taken any steps whatever to comply with this statute of Colorado. The defense interposed was that the plaintiff corporation had not complied with the laws of Colorado with reference to foreign corporations doing business in the State. The defendants prevailed in the trial court, and in passing upon this question this Court (28 L. ed., 1138) said:

"The right of the people of a State to prescribe generally, by its Constitution and laws, the terms upon

which a foreign corporation shall be allowed to carry on its business in the State, has been settled by this Court. The plaintiff in error does not deny this right, but insists that upon a proper construction of Section 10 of Article 15, of the Constitution of Colorado, and of Section 23 of the Act of 1877, its contract with the defendants was valid, and that its suit should have been maintained.

"As the clause in the Constitution and the Act of the Legislature relate to the same subject, like statutes *in pari materia,* they are to be construed together."

To the same effect is the case of *Billingsley* v. *State,* 14 Md., 369, 376. It can not be denied that this provision of the Constitution which forbids Congress from levying a tax upon articles exported and the Act of June 6, 1896, with reference to filled cheese, relate to the same subject as the Act in question, was a revenue measure pure and simple, and was passed for the sole purpose of regulating the manufacture and sale of filled cheese, and of fixing an internal revenue tax thereon. There can be no question, therefore, that under the authorities above cited the provision in the Constitution and the Act itself should be construed together.

It is a well established principle, and has been frequently applied by this Court, that statutes *in pari materia* should be construed together.

In the case of *Ryan* v. *Carter,* 93 U. S., 84; 23 L. ed., 807, 809, the Court said:

"If there were any doubt remaining, about the correctness of this construction, it would be removed by a consideration of the Act of 1807, which is *in pari materia.* Congress passed various laws from time to time respecting the claims to lands in the Territories of Orleans and Louisiana. These laws were modified as policy required; but they constitute one land sys-

tem, are all *in pari materia*, and are to be looked to as one statute in explaining their meaning and import."

To the same effect are *Doe ex. Dem. Patterson* v. *Winn*, 11 Wheat., 380, 386; 6 L. ed., 500.

Atkins v. *Fiber, etc.*, 18 Wall., 301; 21 L. ed., 841, 844.

See also:

The Sloop Elizabeth, 1 Pain, C. C. R., 11; 8 Fed. Cas., 468.

Potter's Dwarris on Statutes, p. 189, and note.

Smith's Commentaries on Statutory and Constitutional Construction, p. 751.

In considering this provision of the Constitution in connection with the Act in question, the Court should also bear in mind that all revenue laws are liberally construed, not only in favor of the Government, in order to prevent frauds upon the revenue, but also against the Government and in favor of parties taxed, so as to carry out the intention of the Legislature.

Cliquot v. *U. S.*, 3 Wall., 114; 18 L. ed., 116, 121.

Smythe v. *Fiske*, 23 Wall., 374; 23 L. ed., 47.

U. S. v. *Stowell*, 133 U. S., 1; 10 Sup. Ct. Rep., 244.

It is also a rule of construction to be applied in cases of this character that the Court will restrain the operation of a statute within narrower limits than its words import if the Court are satisfied that the literal meaning of its language would extend to cases which the Legislature never designed to embrace in it. This rule applied in construing Sec. 9 of the filled cheese Act, in connection with this provision of the Constitution, will restrain the operation of

the first clause of that Section, viz.; "that upon all filled cheese which shall be manufactured there shall be assessed and collected a tax of one cent per pound to be paid by the manufacturer thereof," within narrower limits than its language imports in order than the Act shall not violate this constitutional provision.

The following cases support this proposition:

Lessee of Brewer v. *Blougher,* 14 Pet., 178, 198; 10 L. ed., 408, 418.

Oates v. *National Bank,* 100 U. S., 239, 244; 25 L. ed., 581.

U. S. v. *American Bell Tel. Co.,* 159 U. S., 548; 16 Sup. Ct. Rep., 70.

McKee v. *U. S.,* 164 U. S., 287; 17 Sup. Ct. Rep., 93, 95.

Woolridge v. *McKenny,* 8 Fed. Rep., 650, 659.

There is also another principle of construction applicable and that is that where there are two acts or provisions, one of which is special or particular, and the other general, if the general provision taken alone, involves the same matter as the special provision, and therefore is in conflict with it, the special provision must be taken as an exception to the general.

The case of *Rodgers* v. *U. S.,* 185 U. S., 83; 22 Sup. Ct. Rep., 582, involved a construction of two conflicting provisions in an Act approved March 3, 1899, and entitled "An Act to Reorganize and Increase the Efficiency of the Personnel of the Navy and Marine Corps of the United States," one of which was special and particular, and the other general.

In that case the Court said:

> "This case involves a mere question of statutory construction. The matter of military and naval salaries

is one exclusively within the control of Congress. The Courts may neither increase nor decrease them, correct any supposed inequalities, nor in any manner set aside or modify the action of the legislative branch of the government in respect therto. If there be inequality, injustice, it can be corrected alone by Congress, and the Courts may not interfere.

"The primary rule of statutory construction is, of course, to give effect to the intention of the Legislature. Whenever that is apparent it dominates and interprets the language used. But when the intent is a debatable question, and there is nothing on the face of the statute which clearly indicates such intent, there are certain minor and subsidiary rules by which courts are guided in determining the true construction.

"It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general, the terms of the general broad enough to include the matter provided for in the special, the fact that the one is special and the other general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special."

In that same case the Court quoted with approval the language of Mr. Justice Christiancy in the case of *Crane* v. *Reeder*, 22 Mich., 322, 334, as follows:

"Where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as intended to constitute an excep-

tion to the general act or provision, especially when such general and special acts or provisions are contemporaneous, as the Legislature is not to be presumed to have intended a conflict."

See also *Ex parte Crow Dog,* 109 U. S., 556, 570.

Black on Interpretation of Laws, 116.

Sedgwick on the Construction of Statutory and Constitutional Law, 98.

The application of the above principle to this case must be apparent. The constitutional provision in question is that "no tax or duty shall be laid on articles exported," while the provision of Section 9 of the filled cheese act is "that upon all filled cheese which shall be manufactured there shall be assessed and collected a tax of one cent per pound to be paid by the manufacturer thereof." The provision of the Constitution here is specific that "no tax or duty shall be laid," while the provision of Section 9, as above quoted, is general that a tax shall be laid on all filled cheese manufactured, etc. The special provision of the Constitution being an exception to the general provision of this Act, the two must be construed together as a requirement that upon all filled cheese which shall be manufactured, *except* such filled cheese as shall be exported, there shall be assessed and collected a tax, etc.

Still another principle of construction applicable to this case is that where a law requires two repugnant and incompatible things which are incapable of receiving a literal construction some change of language must be sustained in order to render the law intelligible; and where one of such repugnant requirements is special and particular and the other general in its terms, additional words of qualification may be added as a limitation upon the general

provision, but such words of limitation are never applied to the special provision.

The first part of this rule is very aptly stated by Mr. Chief Justice Marshall in the case of *Huidekoper's Lessee* v. *Douglass,* 3 Cranch. 1, 66; 2 L. ed., 347, 368, and the second part by Mr. Justice Brewer in the case of *Rodgers* v. *U. S.,* 185 U. S., 83; 22 Sup. Ct. Rep., 582, 584.

In the former case the Court said:

> "The law requiring two repugnant and incompatible things, is incapable of receiving a literal construction, and must sustain some change of language to be rendered intelligible. This change, however, ought to be as small as possible, and with a view to the sense of the Legislature, as manifested by themselves. The reading, suggested by the counsel for the plaintiff, appears to be most reasonable, and to comport best with the general language of the section, and with the nature of the subject. It is by changing the participle into the future tense of the verb, and instead of 'and residing, or causing a family to reside thereon,' *shall reside,* etc. The effect of this correction of language will be to destroy the repugnancy which exists in the act as it stands, and to reconcile this part of the sentence to that which immediately follows, and which absolutely demonstrates that in the view of the Legislature, the settlement, and the residence consequent thereon, were distinct parts of the condition; the settlement to be made within the space of two years from the date of the warrant, and the residence in five years from the commencement of the settlement."

In the other case the Court, in referring to the two conflicting provisions of the act involved, one of which was special and particular, and the other general, as already stated, said:

> "But it is said that harmony between the two may be obtained by limiting the operation of the special

> provision to the period between the passage of the act and the 30th, of June following. But that necessitates adding something to the words of the special provision, so that it shall read that from the date of the act until the 30th of June following such should be the rule in respect to the salaries of the recently promoted commodores. But the same harmony can be obtained by adding to the general provision a clause like this: Except in respect to the nine lower numbers of the grade of rear admiral. In either case the harmony is secured by adding some words of qualification, and the rule, as we have seen, is to the effect that the additional words of qualification are to be put to the general provision rather than to the special."

In applying this rule of construction, Section 9 of the Filled Cheese Act must be construed to mean "that upon all filled cheese which shall be manufactured *and not exported*, there shall be assessed and collected a tax of one cent per pound," etc. It must have been the intention of Congress that this act should be so construed. All acts of Congress are of necessity passed with reference to provisions of the Constitution, and it can not be presumed that Congress intended this act to be a violation of the Constitution, but rather that it should be construed in connection with or in the light of the Constitution, and therefore, Congress could only have intended by this act to lay a tax upon all filled cheese manufactured *which was not exported.*

This construction should be adopted, not only because it would be in full harmony with the foregoing rules and authorities; but also because any other construction would make the Filled Cheese Act unconstitutional and the courts, so far as possible, avoid a construction which will make an act unconstitutional.

> *U. S.* v. *Coombs,* 12 Pet., 72; 9 L. ed., 1004, 1006.

U. S. v. *Cent. Pac. Ry. Co.*, 118 U. S., 241; 30 L. ed., 175.

Hooper v. *People*, 155 U. S., 657; 15 Sup. Ct. Rep., 211.

Grenada Co. v. *Brown*, 112 U. S., 261; 28 L. ed., 704.

Parsons v. *Bedford*, 3 Pet., 433, 449; 7 L. ed., 737.

The case of *Rector*, etc., *of Holy Trinity Church* v. *U. S.*, 143 U. S., 457; 12 Sup. Ct. Rep., 511, involved a construction of the alien contract labor law (23 Stat. at L., 332). It appeared in that case that the Holy Trinity Church, a New York corporation, in September, 1887, entered into a contract with E. Walpole Warren, who was then an alien residing in England, under which said Warren was removed to the City of New York, and became a pastor of the church. It was contended that this contract was a violation of the alien contract labor law. In passing upon the question involved the court said:

> "It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator; for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act. As said in *Stradling* v. *Morgan*, Plow. 205: 'From which cases it appears that the sages of the law heretofore have con-

strued statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter they have expounded to extend to but some things, and those which generally prohibit all people from doing such an act they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the act, sometimes by comparing one part of the act with another, and sometimes by foreign circumstances."

See also *U. S.* v. *Hogg*, 112 Fed. Rep., 909; 50 C. C. A., 608.

(4)

The Court, in construing a doubtful statute, will consider:

(a) *The title of the Act.*

While the title of an act will not change or vary its plain provisions in the absence of conflict, it is always considered in cases involving conflict and cases in which the intention is shrouded in uncertainty.

U. S. v. *Fisher*, 2 Cranch., 358, 387; 2 L. ed., 304, 313.

U. S. v. *Palmer*, 3 Wheat., 610, 631.

Smythe v. *Fiske*, 23 Wall., 374; 23 L. ed., 47.

Holy Trinity Church v. *U. S.*, 143 U. S., 457; 12 Sup. Ct. Rep., 511, 513.

Hadden v. *the Collector*, 5 Wall., 107; 18 L. ed., 518.

U. S. v. *Trans. Mo., etc., Assn.*, 166 U. S., 290; 17 Sup. Ct. Rep., 540, 553.

Price v. *Forest*, 173 U. S., 410; 19 Sup. Ct. Rep., 434, 440.

Coosaw Mining Co. v. *State of South Carolina*, 144 U. S., 550; 12 Sup. Ct. Rep., 659.

The Act here involved is entitled "An Act Defining Cheese, also Imposing a Tax Upon and Regulating the Manufacture, Sale, Importation and *Exportation* of Filled Cheese."

Section 1 of the Act defines the word "cheese," and the second section defines "filled cheese." Section 9 of the Act imposes a tax upon filled cheese; section 5 regulates the manufacture of filled cheese; section 3 regulates the sale of filled cheese; section 11 regulates the importation of filled cheese; but the *exportation* of filled cheese is nowhere mentioned or referred to in the Act except in the title. Inasmuch, however, as *exportation* is mentioned in the title Congress must have had in mind the fact that filled cheese is sometimes exported, and it must follow that the reason exportation is not mentioned in the body of the Act is that it is already covered by constitutional provision.

(b). *The act as a whole, including all its provisions.*

In the case of *U. S.* v. *Fisher*, 2 Cranch., 358, 386; 2 ..., 304, 313, Mr. Chief Justice Marshall, in delivering the opinion of the Court, said:

> "It is undoubtedly a well established principle in the exposition of statutes that every part is to be considered, and the intention of the Legislature to be extracted from the whole."

Viewing this Act in the light of this rule we find that Section 9 fixes the amount of the tax to be paid upon filled cheese, and also contains this provision: "The tax levied by this section shall be represented by coupon stamps; and the provisions of existing laws governing the engraving, issue, sale, effacement and destruction of stamps relating to tobacco

and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section."

Section 10 of the Act has the following provision: "That whenever a manufacturer of filled cheese sells, or removes for sale or consumption any filled cheese *upon which the tax is required to be paid by stamps without paying such tax,* it shall be the duty of the Commissioner of Internal Revenue, within a period of not more than two years after such sale or removal upon satisfactory proof, to estimate the amount of tax which has been omitted to be paid and to make an assessment therefor, and to certify the same to the Collector."

Section 16 of the Act is as follows:

> "Upon all packages of filled cheese *subject to tax under this Act* that shall be found without stamps or marks, as herein provided, * * * shall be forfeited to the United States."

If Congress did not intend that there should be exceptions to the assessment and collection of the tax provided and fixed in Section 9; and if it did not contemplate exportation of filled cheese which, under the Constitution would be exempt from taxation, why was reference made in Section 10 to filled cheese *upon which the tax is required to be paid by stamps,* and in Section 16 to filled cheese *subject to tax under this Act?*

If Congress had intended that all filled cheese manufactured should under any and all circumstances, be taxed in accordance with the provisions of Section 9, surely there would have been no occasion in other portions of the Act to have referred to filled cheese *upon which the tax is required to be paid by stamps,* since there was no other means provided by which the tax might regularly be paid; and as there is no provision anywhere in the Act for the exemption

of any filled cheese from the payment of the tax, it must follow that the only exemption which Congress at the time contemplated was the exemption already provided by law.

In the case of *United States* v. *Stowell*, 133 U. S., 1; 10 Sup. Ct. Rep., 244, which was a case involving a forfeit under an internal revenue law, the Court considered various sections of the Act in determining the extent to which Congress intended forfeiture should be enforced.

(5)

It was a duty of the Commissioner of Internal Revenue to make regulations whereby filled cheese could be exported without payment of the tax.

Section 18 of the Filled Cheese Act provided that the commissioner of internal revenue, with the approval of the Secretary of the Treasury, shall make all needful regulations for the carrying into effect the provisions of said act.

Under the provisions of this section the commissioner could have made a regulation whereby an exporter of filled cheese, upon the removal of the same from the factory for exportation, might be required to furnish proper bonds to indemnify the government from any loss which might result from a failure to export the same. Under a regulation of this character the government would have been fully protected against frauds, and such a regulation would have properly carried into effect the provisions of the act.

The court will observe that the act does not provide, as most internal revenue acts do, that this tax shall be paid and the stamp affixed before the product is removed from the factory, and consequently there is nothing in the language of the act which would prevent the commissioner from making a suitable regulation for exportation without violating even the strict letter of the act.

As illustrating the extent to which the government could have been protected against frauds by such a regulation, we call attention to one of the regulations promulgated by the commissioner, which is as follows:

> "Every manufacturer of filled cheese is required to enter daily in a book (form 396) the quantity of materials used for the production of filled cheese, the quantity of materials otherwise used, the number of packages and pounds of filled cheese produced, the number of packages and pounds of filled cheese sold or removed, and the name of the place of business or residence of each person to whom sold or consigned. Model blank form furnished by the Commissioner of Internal Revenue.
>
> This book must always be kept at the manufactory, and be always open to the inspection of any internal revenue officer or agent."
>
> (Regulations Concerning Filled Cheese, Series 7, No. 22, p. 19.)

This regulation afforded an easy method of tracing the entire product of every factory, and if to this regulation the commissioner had added another in effect requiring the manufacturer to give bond to the government, covering the amount of the tax on each consignment exported so conditioned that it should become void upon the exporter furnishing satisfactory proof that such consignment had actually been delivered and sold in a foreign country, filled cheese exported could thus have been lawfully exported without the payment of the tax.

The making of such a regulation was within the power of the commissioner, and it was clearly his duty under the law, to make such regulation for the reason, as we have already seen, that he was bound by his oath to support the Constitution, and the Constitution, as a rule of action gov-

erning his conduct, was quite as binding upon him, or even more so, than any act of Congress.

But instead of promulgating regulations for the proper enforcement of the law, he promulgated the following:

> "The tax of 1 cent per pound imposed by Section 9, of the Act of June 6, 1896, upon all filled cheese manufactured, must be paid by the manufacturers thereof.
>
> "Under the law this tax must be represented by coupon stamps. Such stamps have been prepared in denominations of 10, 20, 30, 40, 50, 60, 70, 80, 90 and 100 pounds with nine coupons, each representing one pound, attached to each stamp, and are obtainable upon application on Form 391 to the collector of the district in which the factory is located.
>
> "The tax-paid stamp must bear the signature of the collector and show thereon the date of payment of the tax, the number of pounds, the number of the factory, and the name of the person by whom or for whom it was canceled.
>
> "On the withdrawal of a package the proper tax-paid stamp must be affixed thereto by the manufacturer in the same manner as the label."
>
> (Regulations Concerning Filled Cheese, Series 7, No. 22, p. 18.)

This regulation, it will be observed, instead of enabling a manufacturer to export his product without the payment of the tax, as the law required, absolutely deprived him of the privilege, because the regulation made it impossible for him to remove the product from his factory without first paying the tax.

Regulations of the department may be made in order to aid in carrying the law as it exists into execution, but they cannot change its positive provisions.

The case of *Morrill* v. *Jones,* 106 U. S., 466; 27 L. ed.,

268, involved a regulation of the Treasury Department, which was made with reference to the importation of live stock. An act of Congress provided that animals especially exported for breeding purposes from beyond the seas, should be admitted free of duty, and the Treasury Department had made a regulation to the effect that before such animals should be admitted free the collector should, among other things, "be satisfied that the animals are of superior stock adapted to improving the breed in the United States."

In passing upon this regulation the court said:

> "The Secretary of the Treasury can not, by his regulations, alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case we are entirely satisfied the regulation acted upon by the collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of 'superior stock.' This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. Congress was willing to admit, duty free, all animals specially imported for breeding purposes; the Secretary thought this privilege should be confined to such animals as were adapted to the improvement of the breeds already in the United States. In our opinion, the object of the Secretary could only be accomplished by an amendment of the law. This is not the office of a treasury regulation."

See also

U. S. v. 200 *Barrels of Whiskey,* 95 U. S., 571; 24 L. ed., 491.

Campbell v. *U. S.,* 107 U. S., 407; 27 L. ed., 593.

II.

IF THE COLLECTOR, UNDER THE STRICT LETTER OF THE ACT OF JUNE 6TH, 1896, WAS REQUIRED TO LEVY AND COLLECT THE TAX IN QUESTION, THEN THE ACT IS UNCONSTITUTIONAL.

From what has already been said it would seem to follow as a natural sequence that if the collector, in the discharge of his duties, was bound to follow the strict letter of the Filled Cheese Act, regardless of the provisions of the Constitution, then the act itself, or at least Section 9 of the act, is unconstitutional in that it fails to make any provision whatever for the exportation of filled cheese without the payment of the tax.

The case of *Pace* v. *Burgess*, 92 U. S., 372; 23 L. ed., 657, 659, has already been referred to, and the only inference to be drawn from that case is that, if the export stamp, required by Congress to be affixed to all goods intended for export, and for which the manufacturer was required to pay a nominal price, could have been regarded as a tax instead of a mere fee for a mark of identification to distinguish goods intended for domestic use and consumption from goods intended for exportation, then that act would have been held by the court as unconstitutional; and it will be observed that the controlling fact in that case, which led the court to that conclusion, was that the nominal price charged for the so-called export stamp had no reference whatever to the size, quantity or value of the package, and that the price which the manufacturer was required to pay for such stamps was barely sufficient to cover the expense to the government for inspection, and the expense of such supervision and regulation as was necessary in order to protect itself against fraud and imposition.

The nominal price charged for these export stamps was

referred to by the court as a fee designed to cover the expense of inspection, etc., and when the court said "The point to guard against is the imposition of a duty under the pretext of fixing a fee" the court in effect said that if the amount charged for the stamp could in any sense have been regarded as a duty or a tax instead of a mere fee, the act would have been regarded and held as unconstitutional.

What has already been said about the case of *Fairbanks* v. *United States*, 181 U. S., 283; 21 Sup. Ct. Rep., 648, 651, 652, 653, applies with equal force to this question. In that case it will be remembered that a provision in the Spanish War Revenue Act requiring a ten cent stamp to be affixed to a foreign bill of lading, was held to be in derogation to this clause of the Constitution and, therefore, void, the court reaching the conclusion, after an elaborate discussion of the question, that a tax upon a bill of lading was in fact a tax upon the goods shipped under such bill of lading.

In the case of *Dooley* v. *U. S.*, 183 U. S., 151; 22 Sup. Ct. Rep., 62, 69, already referred to, and as we have already said, this clause of the Constitution was frequently referred to, both in the majority and dissenting opinions. The court, however, was not divided in its opinion as to this clause of the Constitution, the difference between the majority and the dissenting opinions having reference to questions which in no way affect this case.

As to this clause of the Constitution and the power of Congress to levy any tax upon articles exported, Mr. Chief Justice Fuller, in delivering the dissenting opinion, said:

> "Clauses 5 and 6 of paragraph 9 provide:
>
> " 'No tax or duty shall be laid on any articles exported from any state.'
>
> " 'No preference shall be given to any regulation of

commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another.'

"These provisions were intended to prevent the application of the power to lay taxes or duties, or the power to regulate commerce, so as to discriminate between one part of the country and another. The regulation of commerce by a majority vote, and the exemption of exports from duties or taxes, were parts of one of the great compromises of the Constitution.

"If, after the cession, Porto Rico remained a foreign country, the prohibition of clause 5 would be fatal to these duties; while if Porto Rico became domestic, then as they are customs duties, they could not be sustained, according to *Woodruff* v. *Parham*, under the first clause of paragraph 8; and were also prohibited by clause 5 of paragraph 9, whether customs duties or not, if the application of that clause is not limited to foreign commerce.

"The prohibition that 'no tax or duty shall be laid on articles exported from any state' negatives the existence of any power in Congress to lay taxes or duties in any form on articles exported from a state, *irrespective of their destination*, and, this being so, the act, in imposing the duties in question is invalid, whether Porto Rico after its passage was a foreign or reputed foreign territory, a domestic territory, or a territory subject to be dealt with at the will of Congress regardless of constitutional limitations.

* * * * * * * *

"Again, if in any view these duties could be treated as other than custom duties the result would be the same, inasmuch as the goods were articles exported from New York, and there was a total lack of power to lay *any* tax or duties on such articles.

"The prohibition on Congress is explicit, and noticeably different from the prohibition on the states. The state is forbidden to lay 'any imposts or duties'; Con-

gress is forbidden to lay 'any tax or duty.' The state is forbidden from laying imposts or duties 'on imports or exports'; that is, articles coming into or going out of the United States. Congress is forbidden to tax 'articles exported *from any state*.'"

See also *Marbury* v. *Madison,* 1 Cranch., 178; 2 L. ed., 74.

We have already referred to the cases of *Coe* v. *Errol* and *Brown* v. *Houston,* and have endeavored to show that they have no application in construing this act in connection with the Constitution. The power of a state to tax or control property within its borders ceases when transportation of such property to another state or country commences, because the property then comes under the control of Congress by virtue of the power granted in the Constitution to regulate commerce between the states and foreign countries. The power of Congress over such property, however, is the same after transportation has actually commenced that it was before, because Congress has sole power to regulate commerce, and, therefore, if Congress has any power to lay and collect a tax on articles exported, it has the same power after transportation and exportation have actually commenced that it had before.

It will probably be conceded that under an act of congress a tax could not be laid and collected on articles exported after exportation had actually commenced, and even if it does not therefore follow that no such tax could be laid or collected before exportation had actually commenced, it certainly must follow that cases involving questions of interstate commerce have absolutely no application.

It has already been remarked that all internal revenue acts passed by Congress since the establishment of the internal revenue department, with the exception of this Filled

Cheese Act, made suitable provisions whereby the property taxed might be exported without payment of the tax, or that a tax already paid should be refunded in the form of a drawback after exportation. Internal revenue acts passed subsequent to the Filled Cheese Act, as well as prior thereto, contain such provisions.

It is a well settled principle that by these provisions Congress has placed a construction upon its own powers under the Constitution to lay any such tax upon articles exported, and such construction is binding and should be given great weight by the court in determining the constitutionality of this act.

Stuart v. *Laird,* 1 Cranch., 299; 2 L. ed., 115.
Burlow-Giles Lith. Co. v. *Sarony,* 111 U. S., 53; 28 L. ed., 249; 4 Sup. Ct. Rep., 279.
The Laura, 114 U. S., 411; 29 L. ed., 147; 5 Sup. Ct. Rep., 881.
U. S. v. *Filbrick,* 120 U. S., 52, 59; 30 L. ed., 559, 561; 7 Sup. Ct. Rep., 415.
U. S. v. *Hill,* 120 U. S., 169, 182; 30 L. ed., 627, 632; 7 Sup. Ct. Rep., 510.
Robertson v. *Downing,* 127 U. S., 607 to 613; 32 L. ed., 269, 271; 8 Sup. Ct. Rep., 1328.
Schell v. *Fauche,* 138 U. S., 562, 572; 34 L. ed., 1040, 1043; 11 Sup. Ct. Rep., 376, 380.

The uniformity with which Congress has made provisions in internal revenue acts for exportation without payment of tax not only indicates the construction which Congress has always placed upon this provision of the Constitution, but it also indicates that it was by some inadvertence or oversight that a provision with reference to exportation was omitted from this act.

In either case the act should be held unconstitutional as

violating this restriction upon the power of Congress that "no tax or duty shall be laid on articles exported from any state."

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1903.

No. 116.

C. W. CORNELL and F. B. CORNELL, copartners doing business under the name of Cornell Brothers,
Plaintiffs in Error,

vs.

F. E. COYNE, late United States Collector of Internal Revenue, First District of Illinois,
Defendant in Error.

Additional Brief and Argument for Plaintiffs in Error.

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Defendant in Error.

Additional Brief and Argument for Plaintiffs in Error.

The Rules of the Department compelling the payment of one cent per pound in addition to the special manufacturers' tax on filled cheese, which was intended for export, before it leaves the factory, is in violation of the act of Congress of June 6th, 1896, known as the Filled Cheese Act.

The title of the act itself is an act defining cheese, also imposing a tax upon and regulating the manufacture, sale, importation and *exportation* of filled cheese.

The only attempt in the act to provide for exporting filled cheese is found in Section 9, as follows:

"The tax levied by this section shall be represented by coupon stamps, and the provisions of existing laws governing the engraving, *issue*, sale, accountability, effacement and destruction of stamps relating to tobacco and snuff, so far as applicable, are hereby made to apply to stamps provided for in this section."

We call attention to the fact that the tax is represented by the stamps, and respectfully submit that any variation as to the issue or sale of such stamps in the then existing law would necessarily mean a variation in the tax levied.

To illustrate: If the law said, that all filled cheese containing colored matter would require, in addition to the other stamps required herein, a one dollar stamp on each package, it would mean an additional tax of one dollar, although it would be called an additional stamp.

If the law had stated that all filled cheese in less than pound packages, duly marked according to law, would be furnished free by the department, with a stamp indicating that it contains less than a pound, that would simply mean that no cash stamp being required, no tax was being levied. And, therefore, when the law provides, as it does in the adopted section, that filled cheese intended for immediate export may, under proper conditions, be relieved from the payment of the one cent stamp, by placing a free stamp thereon, indicating that it is for immediate export, it means that the package for immediate export, requiring no cash stamp, is relieved from taxation.

The stamp required under section 3385 on tobacco and snuff, by the act of '96, is furnished by the department free for all exported packages of tobacco and snuff. It is an engraved stamp provided for in the last mentioned section, and on its face reads as follows:

Tobacco and Snuff
for immediate
Exportation.

No. .... Series A-1883
Issued to.....
By.....
Coll—Dist .....
Manufactured tobacco ..... lbs.
Snuff ..... lbs
Affixed and cancelled ..... 18..
..... Inspector.
United States Internal Revenue.
Bureau of Engraving and Printing.

The law then existing relating to the stamps issued for tobacco and snuff, and which Congress made a part of the so-called Filled Cheese Law, is as follows:

"Section 3385. Manufactured tobacco, snuff and cigars intended *for immediate exportation* may, after being properly inspected, marked and branded, be removed from the manufactory in bond *without having affixed thereto the stamps indicating the payment of the tax thereon.* The removal of such tobacco, snuff and cigars from the manufactory shall be made under such regulations, and after making such entries, and executing and filing with the collector of the district from which the removal is to be made such bonds and bills of lading, and giving such other additional security as may be prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury. There shall be affixed to each package of tobacco, snuff and cigars intended for immediate export, before it is removed from the manufactory, *an engraved stamp indicative of such intention.* Such stamp shall be provided and furnished to the several collectors as in the case of other stamps, and they shall account for the use of the same. When the manufacturer has made the proper entries, filed the bonds, and otherwise complied with the requirements of law and regulations as herein

provided, the collector shall issue to him a permit for the removal. * * *"

The construction we contend for then is that the law is as above quoted, and should read: "Manufactured tobacco, snuff, *and filled cheese* intended for immediate exportation may, after being properly inspected, marked and branded, be removed from the manufactory in bond without having affixed thereto the stamps indicating the payment of the tax thereon," by simply affixing an engraved stamp indicative of such intention, which under the law is furnished free. It is admitted by the demurrer that the plaintiff in error notified the government that they had these articles on hand for immediate export.

It is common and proper for the legislative branch to adopt the existing law, and by special provision make it a part of new and additional laws upon similar subjects. No plainer case can be quoted than the present act under consideration, which in Section 3 provides for a special tax, known as the special manufacturers' license or tax of four hundred dollars per annum on every factory, and being satisfied with the law then in force as to special taxes, said Section 3 adopts, so far as is applicable, Sections 3233, 3234, 3235, 3236, 3237, 3238, 3239, 3240, 3241 and 3243, then in force as a part of the Filled Cheese Act, and the department adopt those sections and are governed by them.

The title also provides for the regulation of the sale and the only provision in the body of the act provides that the wholesale dealer shall pay $250 per annum, and the retail dealer $12 per annum, and adopts ten sections of the then law, 3232 to 3243, both inclusive, as a part of the law regulating the sale of filled cheese, which is also adopted by the department, the same as if it had been bodily incorporated in the Act of 1896, known as the Filled Cheese Act.

The title of the act announces the intention to regulate manufacturing and sale and the only regulation as to manufacturing or sale is found in the then existing law, adopted by Congress as a part of the Filled Cheese Act. What is true as to the manufacturing and sale is also true as to the exportation. The title of the act assumes and asserts that it will provide for the exportation, and the only effort of the act itself to conform to the title upon the subject of exportation is the adoption of Section 3385 of the Statutes then in force, which provides for the exportation of tobacco by affixing a free stamp indicative of its purpose. It is, to say the least, remarkable that the department by its rules and regulations cheerfully adopts ten sections of the then existing law in regard to special taxes, which produces revenue. It adopts old law as to license of wholesale and retail dealers and utterly refuses to adopt one section which might reduce the revenue as to sale and issue of stamps for exported articles, although the act itself, in the title, and in the body of the act makes the same attempt to adopt the only section providing for stamps for exportation as it does for adopting the ten sections providing for manufacture and sale.

In brief, while the title of the act says it will regulate four things, viz.: the *manufacture, sale, importation and exportation* of filled cheese, the body of the act is silent as to three things, viz.: the manufacture, sale and exportation of filled cheese, except as it adopts as a part of the act, the then existing law as to manufacture, sale and exportation of other articles specially taxed by the government. And the department regulation adopts the then existing law which became (by the Filled Cheese Act) part of the act itself, as to the *manufacture* and *sale*, but refused to adopt as part of that law the provisions of the then existing law in regard to

sale and issue of export stamps on tobacco, which was adopted by the act of Congress, in just as plain and unmistakable terms as it did for the provision of the manufacture and sale.

We ask that the department should be directed to apply the same rule of construction in adopting for its rules Section 3385 as they do in adopting for its rules the ten sections as to manufacture and sale. This construction would put the department rules in harmony with the statute; in harmony with all of the other laws, then in force at that time upon the subject of stamping exporting goods upon which the government had levied this special tax; it would put the law in harmony with its own title, and better than all that it would put it in harmony with the constitution, which provides that the government shall not levy a tax or duty on articles exported.

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